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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DISTRICT

DAVID HOUGH; et al

Plaintiffs,

v.

RYAN CARROLL; et al

Defendants.

Case No.: 2:24-cv-02886

Assigned for all purposes to:
JUDGE WESLEY L. HSU

DEFENDANTS RYAN CARROLL;
MAX K. DAY; MAX O. DAY;
MICHAEL DAY; YAX
ECOMMERCE LLC; PRECISION
TRADING GROUP, LLC; WA
DISTRIBUTION LLC;
PROVIDENCE OAK
PROPERTIES, LLC; WA
AMAZON SELLER LLC; MKD
INVESTMENT ADVISOR, LLC;
MKD FAMILY BENEFICIARY,
LLC; MKD FAMILY PRIVATE
MANAGEMENT COMPANY,
LLC; MAX DAY CONSULTING,
LLC; HOUTEX FARM EQUITY
PARTNERS LLC; BUSINESS
FINANCIAL SOLUTIONS
ADVISORY LLC; EVO MAXX
LLC; YAX IP AND
MANAGEMENT INC. (D.B.A.
“FULFILLABLE”); WWKB LLC;

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AND DREAMS TO REALITY
LLC'S RESPONSE TO
PLAINTIFFS' EX PARTE
MOTION FOR CONTINUANCE

Action Filed: April 9, 2024
Trial Date: N/A

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1 COME NOW **SPECIALLY APPEARING DEFENDANTS RYAN**
2 **CARROLL; MAX K. DAY; MAX O. DAY; MICHAEL DAY; YAX**
3 **ECOMMERCE LLC; PRECISION TRADING GROUP, LLC; WA**
4 **DISTRIBUTION LLC; PROVIDENCE OAK PROPERTIES, LLC; WA**
5 **AMAZON SELLER LLC; MKD INVESTMENT ADVISOR, LLC; MKD**
6 **FAMILY BENEFICIARY, LLC; MKD FAMILY PRIVATE MANAGEMENT**
7 **COMPANY, LLC; MAX DAY CONSULTING, LLC; HOUTEX FARM**
8 **EQUITY PARTNERS LLC; BUSINESS FINANCIAL SOLUTIONS**
9 **ADVISORY LLC; EVO MAXX LLC; YAX IP AND MANAGEMENT INC.**
10 **(D.B.A. “FULFILLABLE”); WWKB LLC; and DREAMS TO REALITY LLC**
11 **(“Defendants”), and hereby files *Defendants’ Response to Plaintiffs’ Ex Parte***
12 ***Motion for Continuance (“Response”)* and respectfully shows the Court as follows:**

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17 **MEMORANDUM OF POINTS AND AUTHORITIES**
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19 **I. FACTUAL AND PROCEDURAL BACKGROUND**

20 1. On April 9, 2024, Plaintiffs filed an *Ex Parte* Application for a Temporary
21 Restraining Order and an Order to Show Cause regarding a Preliminary Injunction
22 (“Application”), seeking the extraordinary remedy of a freeze of all of the
23 Defendants’ assets pre-judgment as well as a disclosure of all their financial
24 information pre-judgment. *See* Dkt. 9.
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1 2. On April 11, 2024, Defendants filed an Opposition to Plaintiffs' Application
2 ("Opposition") on the grounds that (a) this Court lacked personal jurisdiction over
3 the Defendants; (b) the case should be compelled to binding arbitration pursuant to
4 the Plaintiffs' written contracts; (c) Plaintiffs lacked a legal basis to freeze all of the
5 Defendants' assets; (c) Plaintiffs failed to establish a likelihood of success on the
6 merits on any of their claims; (d) Plaintiffs' evidence of alleged representations
7 outside the written contracts constituted inadmissible parol evidence; (e) Plaintiffs
8 had not established irreparable harm sufficient to grant a mandatory injunction that
9 went beyond maintaining the status quo; and (f) the balance of the equities did not
10 tip in Plaintiffs' favor. *See* Dkt. 13.

14 3. On April 12, 2024, Plaintiffs filed a Reply to Defendants' Opposition to
15 Plaintiffs' Application. *See* Dkt. 15.

17 4. On April 15, 2024, this Court issued a Temporary Restraining Order
18 ("TRO"), holding that (a) the Court did not have personal jurisdiction over any of
19 the Defendants apart from the Defendants Ryan Carroll; Max O. Day; Max K. Day;
20 Michael Day; Yax Ecommerce LLC; WA Distribution LLC; and Precision Trading
21 Group, LLC (the "Jurisdictional Defendants") based upon the facts available to
22 the Court at the present time; (b) that the Jurisdictional Defendants were ordered to
23 appear at an OSC on April 19, 2024 regarding why a preliminary injunction ("PI")
24 should not issue prohibiting them from withdrawing, transferring, spending, or
25 otherwise disposing of any assets held by or for the benefit of Jurisdictional
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1 Defendants until the close of this proceeding, except that each human Defendant
2 would be allowed to spend \$9,000 per month and have the ability to seek leave of
3 Court for additional expenditures; and (c) ordering the Jurisdictional Defendants to
4 identify account information for all accounts that contain assets held by or for the
5 benefit of the Jurisdictional Defendants. *See* Dkt. 17.

6
7 5. At the hearing on April 19, 2024, the Jurisdictional Defendants' counsel
8 requested that this court (a) continue the hearing on the Application to allow for
9 supplemental briefing on the issues of the asset freeze and the financial disclosures;
10 (b) increase the monthly spending limit in the TRO for the individual Defendants to
11 \$13,000 per month; (c) include a provision in the TRO allowing the Jurisdictional
12 Defendants to pay their attorney's fees. The Court agreed with the Jurisdictional
13 Defendants' arguments in this regard and (a) set a continued hearing for April 29,
14 2024; (b) set a supplemental briefing schedule for that hearing; and (c) issued a
15 Minute Order reflecting the changes to the TRO. *See* Dkt. 21.

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17 6. On April 25, 2024, Plaintiffs filed their *Ex Parte* Motion for Expedited
18 Briefing and Motion for Leave to Conduct Expedited Discovery ("**Discovery**
19 **Motion**"). *See* Dkt. 25.

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21 7. On April 26, 2024, the Jurisdictional Defendants filed a Supplemental Brief in
22 Opposition to Plaintiffs' Application ("**Supplemental Brief**") in accordance with
23 the Court's Minute Order, addressing the harm that would be suffered by the
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1 Jurisdictional Defendants if the TRO becomes a preliminary injunction and other
2 matters. *See* Dkt. 31.

3
4 8. On April 29, 2024, the Jurisdictional Defendants filed their Opposition to the
5 Plaintiffs' Discovery Motion. *See* Dkt. 36.

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7 9. On April 30, 2024, the Jurisdictional Defendants filed a Motion to Compel
8 Arbitration and a Motion to Stay based upon the fact that all Plaintiffs' contracts
9 with Wealth Assistants contained broad arbitration clauses by which Plaintiffs
10 agreed to arbitrate all of their claims herein. *See* Dkt. 39. This matter is set for
11 hearing on June 7, 2024. *Id.*

13 10. On April 30, 2024, Defendants also filed a Motion to Dismiss Plaintiffs'
14 claims based upon Rule 12(b)(2) and Rule 12(b)(6). *See* Dkt. 40. This matter is also
15 set for hearing on June 7, 2024. *Id.*

17 11. On April 30, 2024, following a hearing on this matter, the Court issued a
18 Minute Order Extending and Amending the TRO (“**Amended TRO**”) and granting
19 Plaintiffs’ Motion for Leave to Conduct Expedited Discovery. *See* Dkt. 38. In its
20 April 30 Minute Order, the Court held that “‘assets owned by or held for the benefit
21 of Defendants’ is confirmed to mean ‘any assets over with the Jurisdictional
22 Defendants have dominion and control’”; and set a continued hearing for May 13,
23 2024. *Id.*

26 12. On May 13, 2024, the Court issued an Order Discharging the Order to Show
27 Cause and Granting a Preliminary Injunction Freezing Assets. *See* Dkt. 49.

13. On May 15, 2024, Plaintiffs filed their third *ex parte* motion, this time an *Ex*
2 *Parte* Motion to Continue the hearing on Defendants' Motion to Compel
3 Arbitration and Motion to Dismiss ("Motion"). *See* Dkt. 52. Plaintiffs' Motion is
4 completely without merit and is merely a transparent stall tactic to avoid the clear
5 arbitration clauses in their contracts with Wealth Assistants. There is no valid basis
6 to continue these hearings, thus the Motion should be denied.
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10 **II. ARGUMENT AND AUTHORITIES**

11 14. As a preliminary matter, Plaintiffs counsel has now filed a third *ex parte*
12 hearing and is currently threatening Defendants with a fourth. *Ex parte* hearings are
13 meant to address true emergencies not to needlessly burden the Court, Defendants,
14 and their counsel on a weekly basis with new complaints. Defendants consider the
15 continual threats of a numerosity of *ex parte* hearings to be an abuse of the *ex parte*
16 process.
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19 15. Nevertheless, Plaintiffs' Motion is meritless. Shortly before filing the Motion,
20 Plaintiffs' counsel informed Defendants' counsel that he wished to turn this
21 litigation into a class action. This is unsurprising as Plaintiffs' counsel has now
22 found a favorable forum after thorough forum shopping in state court and various
23 arbitration forums. However, it is not a valid reason to continue the current hearing
24 dates. Defendants set their hearings more than twenty-eight (28) days out, even
25 though they will suffer great harm by waiting for these hearing dates due to the
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1 numerous *ex parte* filings of Plaintiffs' counsel and the associated emergency
2 orders therewith. Defendants will be substantially prejudiced if these hearings are
3 continued out even further.
4

5 16. Even if Plaintiffs are ultimately successful in certifying a class, it would not
6 change the merits of the Motion to Compel Arbitration or Motion to Dismiss. Every
7 single one of Wealth Assistants' clients, including the ones that Plaintiffs' counsel
8 has mentioned he intends to bring into this litigation signed arbitration agreements.
9 All of Wealth Assistants' clients also signed one of two standard contracts, which
10 are already both represented by the Plaintiffs in this case. Thus, the analysis of the
11 issues on the Motion to Compel Arbitration and the Motion to Dismiss would
12 remain identical. Even if Plaintiffs amend their pleading, Defendants would urge
13 the Court to apply the prior Motion to Dismiss to the amended pleading in
14 accordance with federal law.
15

16 17. Plaintiffs' counsel, Nico Banks ("Mr. Banks") is well aware of these facts as
17 he represents plaintiffs with identical claims against Wealth Assistants in nearly a
18 dozen different forums, including a mass arbitration (*Individual Claimants vs. Yax*
19 *Ecommerce* (hereinafter "Mass Arbitration")). The same day this Motion was filed,
20 Mr. Banks did advise the American Arbitration Association ("AAA") that he was
21 withdrawing his claims with respect to four California claimants in the Mass
22 Arbitration, presumably so he could bring them into this more favorable forum.
23 However, Mr. Banks has no valid basis to do so and Respondent has objected to
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1 such withdrawal. Mr. Banks alleges that this is being done pursuant to California
2 Code of Civil Procedure § 1281.97, which permits withdrawal from arbitration in
3 favor of litigation if a respondent has not paid the arbitration fees. However, Wealth
4 Assistants has timely paid all fees requested by AAA in the Mass Arbitration and all
5 other arbitrations instituted by Mr. Banks.
6

7 18. Per the correspondence sent by AAA, Wealth Assistants' fees were due on
8 May 9, 2024.¹ Wealth Assistants' counsel began requesting a payment link for a
9 credit card/wire transfer on May 5, 2024 and followed up many times without
10 response from AAA.² After calling on May 9, 2024 and leaving a voicemail
11 because an out of town response was received from the case manager to the May 9,
12 2024 email, Wealth Assistants' counsel subsequently spoke to the AAA Mass
13 Arbitration Intake Team three separate times before finally receiving the correct
14 link for wire transfers payment of the \$8,125 fee. *Id.* Due to the delay in receiving
15 proper payment instructions from AAA, Wealth Assistants paid the \$8,125 timely
16 via wire transfer the morning of May 10, 2024, which AAA accepted.³ The delay of
17 less than 9 hours was de minimis and was not due to any fault of Wealth Assistants.
18 Claimants have suffered no prejudice from this minor delay and claimants are
19 continuing to pursue the Mass Arbitration for non-California residents. Thus, there
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27 ¹ See **Exhibit A**, Letter from AAA dated April 26, 2024.

28 ² See **Exhibit B**, Correspondence with AAA from May 5, 2024 to May 9, 2024.

³ See **Exhibit C**, Email correspondence from AAA dated May 10, 2024.

1 is no valid basis for the claimants in the Mass Arbitration nor any other claimant or
2 plaintiff to avoid their mandatory arbitration clauses with Wealth Assistants.
3

4 19. Here, as set forth in the Jurisdictional Defendants' Motion to Compel
5 Arbitration, the FAA applies. *See* Dkt. 39 at pp. 8-9. The FAA reflects a strong
6 federal policy toward resolving disputed arbitrable issues through arbitration;
7 indeed, "any doubts concerning the scope of arbitrable issues should be resolved in
8 favor of arbitration, whether the problem at hand is the construction of the language
9 itself or an allegation of waiver, delay, or a likely defense to arbitrability." *Moses H.*
10 *Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

11 12 20. Under the FAA, Texas and Florida law, once a party seeking to compel
13 arbitration establishes that (1) there is a valid agreement to arbitrate and (2) that the
14 claims raised are within the agreement's scope, then the trial court must compel
15 arbitration. *See* 9 U.S.C. §§2, 4 (FAA); TEX. CIV. PRAC. & REM. CODE §§171.001,
16 171.002, 171.021 (TAA); *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d
17 1126, 1130 (9th Cir. 2000) (the court's role is limited to determining whether a valid
18 arbitration agreement covering the claims exists); *Halliburton Energy Servs., Inc. v.*
19 *Ironshore Specialty Ins. Co.*, 921 F.3d 522, 530 (5th Cir. 2019); *Forest Oil Corp. v.*
20 *McAllen*, 268 S.W.3d 51, 56 (Tex. 2008); *Seifert v. U.S. Home Corp.*, 750 So. 2d
21 633, 636 (Fla. 1999).

22 23 24 25 26 27 28 21. The policy in favor of enforcing arbitration agreements is so compelling that a
court should not deny arbitration "unless it can be said with positive assurance that

1 an arbitration clause is not susceptible of an interpretation which would cover the
2 dispute at issue.” *Prudential Sec. Inc., v. Marshall*, 909 S.W.2d 896, 898-99 (Tex.
3 1995); *Accord Downs*, 248 Cal. App. at 185; *Royal Pro. Builders, Inc. v. Roggin*,
4 853 So. 2d 520, 523 (Fla. Dist. Ct. App. 2003).

6 22. A stay of litigation pending the conclusion of arbitration is mandatory in any
7 case raising a dispute referable to arbitration under the FAA. 9 U.S.C. § 3; *See also*
8 *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 22.

10 23. In *Coinbase, Inc. v. Bielski*, 599 U.S. 736, 743 (2023), the Supreme Court in
11 holding that the FAA requires district courts to stay proceedings even during the
12 interlocutory appeal of an order denying a motion to compel arbitration, stated that
13 the right to the interlocutory appeal “would be largely nullified” absent a stay.
14 (*Coinbase, Inc.*, 599 U.S. at 743.) The Supreme Court held that if the parties were
15 forced to continue to litigate in the lower court, “many of the asserted benefits of
16 arbitration (efficiency, less expense, less intrusive discovery, and the like) would be
17 irretrievably lost—even if the court of appeals later concluded that the case actually
18 had belonged in arbitration all along.” *Id.* In other words, the value of arbitration is
19 totally undercut if court litigation proceeds and a higher court ultimately determines
20 that the motion to compel arbitration was improperly denied. (*See Apostol v.*
21 *Gallion*, 870 F.2d 1335, 1338 (C.A.7 1989) [“[i]t makes no sense for trial to go
22 forward while the court of appeals cogitates on whether there should be one.”].)
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1 24. If Plaintiffs are permitted to unlawfully continue the hearing on the Motion to
2 Compel Arbitration while Plaintiffs' counsel seeks to certify a class and
3 undoubtedly conduct yet more expedited discovery in the process, the value of
4 arbitration in reducing the expense of discovery and quickly resolving claims would
5 be totally undercut and much of the benefits of arbitration would be lost in violation
6 of *Coinbase* and California law.
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9 25. As federal substantive law, the FAA preempts contrary state law. *See Prima*
10 *Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 400 (1967). The FAA
11 preempts any state law that restricts the right to arbitrate. *See Sonic-Calabassas A,*
12 *Inc. v. Moreno* (2013) 57 Cal. 4th 1109, 1144 ("a state-law rule is preempted [by
13 the FAA] when its impact is such that it interferes with fundamental attributes of
14 arbitration"); *Accord Chamber of Com. of the United States of Am. v. Bonta*, 62
15 F.4th 473, 486 (9th Cir. 2023).
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18 26. In the context of stays pending resolution of a motion to compel arbitration,
19 courts find that the prejudice of delay "is outweighed by the potential prejudice that
20 would result from further litigation of claims which may ultimately be subject to
21 arbitration." *Zamudio v. Aerotek, Inc.*, No. 121CV01673JLTCDB, 2024 WL 863715,
22 at *3 (E.D. Cal. Feb. 28, 2024) (collecting cases). This continuance "stands as an
23 obstacle to the accomplishment and execution of the full purposes and objectives of
24 Congress." (*Wisconsin Public Intervenor v. Mortier*, 501 US 597, 605 (1991)).
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1 27. In *Sarah Car Care, Inc. v. LogistiCare Sols., LLC*, the 3rd Circuit held that
2 allowing discovery to proceed would “erase the ‘benefits of arbitration’ such as
3 ‘efficiency, less expense, less intrusive discovery, and the like.’” No. 21-3108, 2023
4 WL 5378845, at *1 (3d Cir. Aug. 22, 2023) (*Citing Coinbase*, 599 U.S. at 743). The
5 continuance of these hearings, which would allow Plaintiffs to file numerous
6 additional *ex parte* motions seeking further orders from the Court in the interim and
7 conducting class-discovery and other discovery law and motion practice would
8 certainly erase the majority, if not all, of the benefits of arbitration.
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10 28. Defendants, unlike Plaintiffs, have tried to avoid unnecessary *ex parte* filings
11 and have set their motions for regularly noticed dates, but if this Motion is granted,
12 Defendants will be forced to file for an *ex parte* stay of these proceedings until the
13 Motion to Compel Arbitration is resolved.
14

15 29. Thus, the Defendants respectfully request that the Court deny Plaintiffs’
16 Motion for a Continuance.
17

18 20 **III. CONCLUSION**
19

20 30. Based on the foregoing and for good cause shown, Defendants respectfully
21 requests that this Court deny Plaintiffs’ *Ex Parte* Motion for Continuance and for
22 such other and further relief to which the Defendants may show themselves to be
23 justly entitled.
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25 27 Dated: May 17, 2024.
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28 Respectfully submitted,

1 By: /s/ William H. Shibley
2 William H. Shibley
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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for Defendants, certifies that this Motion contains 2,606 words, which complies with the word limit of L.R. 11-6.1

/s/ William H. Shibley
William H. Shibley

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document, and any attachments, will be served to counsel of record, in accordance with the governing rules of procedure regarding service in this court on this **May 17, 2024**, via email as follows:

/s/ William H. Shibley
William H. Shibley